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Supreme Court, U.S.
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No: 04-1209

IN THE

Supreme Court of the United States

MARTIN A. POLITZER,

Petitioner,

v.

SALOMON SMITH BARNEY INC.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT SALOMON SMITH BARNEY IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully submits that the sole question presented by the instant Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, is as follows:

1. Whether the Court of Appeals properly concluded – consistent with every other Court of Appeals to address the issue – that a putative class action brought under state law, seeking the restitution of brokerage commissions paid in connection with securities transactions, is preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

A. The Complaint 1

B. Proceedings Below 2

REASONS FOR DENYING THE PETITION 4

A. The Questions Presented by Petitioner Were Not Decided by the Courts Below 5

B. The Ninth Circuit's Memorandum Disposition Is Consistent With the Decisions of Other Federal Appellate Courts Concerning SLUSA 8

C. The Disposition Below Does Not Raise Any Federalism Concerns 10

D. The Court Should Not Grant Review on a Writ of Certiorari Because the Ninth Circuit's Opinion Was Unpublished and Nonprecedential 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Page(s)

Behlen v. *Merrill Lynch*,
311 F.3d 1087 (11th Cir. 2002) 9

Beneficial National Bank v. *Anderson*,
539 U.S. 1 (2003)..... 11

Dabit v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
395 F.3d 25 (2d Cir. 2005) 8, 9

Ellis v. *Dixon*,
349 U.S. 458 (1955)..... 7

Falkowski v. *Imation Corp.*,
309 F.3d 1123 (9th Cir. 2002) 8, 10, 11

Green v. *Ameritrade, Inc.*,
279 F.3d 590 (11th Cir. 2002) 8, 9, 10

Kircher v. *Putnam Funds Trust*,
No. 04-1495, 2005 WL 757255
(7th Cir. April 5, 2005)..... 10

Riley v. *Merrill, Lynch, Pierce, Fenner & Smith*,
292 F.3d 1334 (11th Cir. 2002) 8

Rowinski v. *Salomon Smith Barney Inc.*,
398 F.3d 294 (3d Cir. 2005) 8

SEC v. *Zandford*,
535 U.S. 813 (2002)..... 7

Spielman v. *Merrill Lynch, Pierce, Fenner & Smith*,
332 F.3d 116 (2d Cir. 2003) 10

STATUTES AND RULES

15 U.S.C. § 78a *et seq* 7

Securities Exchange Act of 1934,
ch. 404, 48 Stat. 881 (codified as amended at
15 U.S.C. § 78a *et seq.*) 7

Securities Litigation Uniform Standards Act of 1998,
Pub. L. No. 105-353, 112 Stat. 3227 i

Fed. R. App. P. 34(a)(2) 3, 4, 5

9th Cir. R. 36-3 12

California Business & Professions Code § 17200 *et seq* 2, 3

MISCELLANEOUS

Robert L. Stern *et al.*, *Supreme Court Practice*
(8th ed. 2002) 7, 12

S. Rep. No. 105-182 (1998) 11

COUNTERSTATEMENT OF THE CASE

A. The Complaint

Petitioner, on behalf of a putative class of Salomon Smith Barney ("SSB") retail customers, seeks compensatory damages and disgorgement of commissions and other fees paid to SSB in connection with a brokerage account that he maintained at SSB. At its core, the complaint alleges a deceptive scheme to issue materially false and misleading investment recommendations in connection with the purchase and sale of securities.

SSB research analysts issue reports and notes on the securities of publicly-traded companies, which contain recommendations to investors to buy, hold or sell such securities. SSB provides this research to its retail brokerage customers, such as Petitioner. Petitioner alleges that he and the members of the putative class, all of whom are SSB customers, paid commissions and fees in connection with their brokerage accounts with SSB at least in part because they sought to obtain SSB's unbiased research and research-based recommendations.

According to Petitioner, however, SSB's research and analysis were biased during the putative class period. Petitioner claims that in an effort to "direct hundreds of million dollars [sic] in investment banking business to SSB," the firm issued "purposely misleading reports and ratings." (Compl. ¶ 17.) Among the misrepresentations and omissions alleged in the complaint, Petitioner alleges that "[a]s part of the scheme, SSB would issue supremely optimistic stock reports and ratings, which were knowingly false and unrealistic, containing strong recommendations that overstated the potential for share price appreciation while unreasonably minimizing the risks." (*Id.*)

Petitioner brings three causes of action, all under California law. First, Petitioner alleges "misrepresentations and omissions" under the California Consumer Legal Remedies Act. (*Id.* ¶¶ 27-30.) Second, Petitioner brings a claim under

California Business & Professions Code § 17200 *et seq.*, alleging that SSB's research reports were "fraudulent." (*Id.* ¶¶ 31-35.) Third, Petitioner brings a common law claim for constructive fraud, alleging that SSB "faile[d] to disclose material information." (*Id.* ¶¶ 36-40.)

B. Proceedings Below

Petitioner filed the class action complaint in this action in California Superior Court for the County of Los Angeles on January 29, 2003. SSB removed the action to the United States District Court for the Central District of California on February 20, 2003, because the action was a state-law securities fraud class action preempted by SLUSA. On April 18, 2003, Petitioner moved to remand this action to state court; on April 25, 2003, SSB opposed that motion and cross-moved to dismiss the action as preempted by SLUSA.

On April 16, 2002, just two days before his motion to remand was due, and nearly two months after this action was removed to federal court, Petitioner filed a First Amended Complaint that included certain wording changes to the original complaint, and added a cause of action for false advertising. (App. at 8a.) Most relevantly, Petitioner carefully excised all references to the word "commissions," and similarly took pains to scrub the complaint clean of any references to his purchases or sales of securities through SSB that were mentioned in the original complaint. Indeed, the district court (Walter, J.) would describe the First Amended Complaint as "substantially the same as his [original] Complaint," except for the addition of another state cause of action and "the deletion of certain language in an apparent effort to avoid SLUSA preemption." (*Id.*)

The district court took the motions under submission and on June 16, 2003, in an unpublished minute order, granted SSB's motion to dismiss, simultaneously denying Petitioner's motion for remand to state court. Addressing the remand

motion first, the district court noted that, in determining a question of removal jurisdiction, it was obligated to consider the complaint "as of the time the removal petition was filed." (*Id.* at 8a-9a) (emphasis removed). Therefore, the district court ruled that the First Amended Complaint was "irrelevant" in determining whether removal was proper (*id.* at 9a), and did not consider the First Amended Complaint at all in deciding the remand issue.

The district court then concluded that the misrepresentations and omissions described in the complaint were alleged "in connection with the purchase or sale of a covered security" as that term is used in SLUSA, and that the complaint thus must be dismissed as preempted by the statute. (*Id.* at 13a-16a.) For a number of reasons, the district court held, Petitioner "cannot escape the obvious connection between the alleged misrepresentations in [SSB's] Research Products and the purchase or sale of securities." (*Id.* at 14a.) The district court explained that an investor such as Petitioner "would only be concerned with the accuracy of [SSB]'s Research Product if [Petitioner] intended to, and did, in fact, rely on them in deciding to purchase or sell stock." (*Id.*) Similarly, the district court reasoned that the fact that Petitioner seeks to recoup fees and commissions for brokerage services from SSB underscores the connection of his claims to the purchase and sale of securities. (*Id.* at 14a-15a.)

The district court dismissed the action without prejudice, and granted Petitioner leave to replead his claims under the federal securities laws. (*Id.* at 16a.) Petitioner declined to do so, and the parties stipulated to a proposed order dismissing the action with prejudice, which the district court approved on July 28, 2003. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit (Fernandez, Silverman and Callahan, C.J.J.), took the appeal on submission pursuant to Federal Rule of Appellate Procedure 34(a)(2), and issued a short unpublished

memorandum disposition affirming the district court. (*Id.* at 1a-3a.) The Ninth Circuit concluded that the district court was correct "in dismissing [Petitioner's] claims as preempted because SLUSA provides for the removal and dismissal of class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security." (*Id.* at 2a.) The Ninth Circuit rejected Petitioner's contention that he should be permitted to file an amended complaint clarifying his state-law claims; the panel noted that Petitioner failed even to mention this argument until his reply brief on appeal. (*Id.* at 3a.)

Petitioner subsequently filed the instant Petition seeking a writ of certiorari. Notably, the Petition does *not* assert that the courts below erred in refusing to consider Petitioner's amended complaint for SLUSA preemption purposes. Accordingly, the only question before the Court is whether the Ninth Circuit's decision that the original complaint – in which Petitioner sought to recover the brokerage commissions that he paid SSB – is preempted under SLUSA.

REASONS FOR DENYING THE PETITION

Petitioner's request for this Court to grant a writ of certiorari describes a case almost unrecognizable as the action litigated below. Contrary to the suggestion in the Petition, this case does *not* raise the question whether a claim concerning a transaction not involving a purchase or sale of securities is preempted under SLUSA. It is manifestly apparent that Petitioner's claims are inextricably intertwined with purchases and sales of securities. The Courts of Appeal are unanimous in their view that such claims are preempted under SLUSA.

In truth, far from creating a circuit split, this case falls squarely in the heartland of cases that the Courts of Appeal have held are preempted by SLUSA, and thus does not warrant review by this Court. The Ninth Circuit's summary, unpublished affirmance of the district court broke no new

ground, and is nothing more than a routine application of a federal statute that in no way conflicts with any other Circuit's interpretation of SLUSA. In fact, the result of the memorandum disposition below is fully consistent with the many other Circuits to have addressed the question whether claims for brokerage commissions are preempted by SLUSA.

The disposition resolves no significant question of federal law, nor does it create a circuit split; accordingly, we respectfully submit that this Court should decline to grant the petition for a writ of certiorari.

A. The Questions Presented by Petitioner Were Not Decided by the Courts Below

Petitioner has presented two questions for review by this Court. First, "[w]hether the Ninth Circuit's decision that SLUSA extends to state law actions which do not involve the purchase or sale of a publicly traded security," in alleged conflict with two other Circuits, expands federal law impermissibly. (Pet. at i.) Second, "[w]hether construing SLUSA's 'in connection with' jurisdictional prerequisite to include cases that do not involve a purchase or sale of a security improperly forecloses remedies under California law...." (*Id.*) Neither the Ninth Circuit nor the district court below considered these questions, and, indeed, this case does not raise either of them.

Petitioner predicates both of these questions on the contention that his action does not "specifically allege injury or claims arising from the purchase or sale of securities, for himself or for the purported class" (Pet. at 6), but the record proves exactly the opposite. Petitioner's original complaint was replete with references to the payment of commissions to SSB, and in fact sought restitution of those commission payments:

"Plaintiff at all time [sic] relevant hereto was a client of SSB and paid fees and/or commissions to SSB during that time." (Compl. ¶ 4.)

"The Class is comprised of all SSB California clients and clients of California based brokers of SSB who paid SSB and its brokers fees and commissions for retail services at any time on or after November 1997 until the present." (*Id.* ¶ 10.)

"As a direct proximate result of the aforementioned acts, SSB received and continues to receive fees and commissions from plaintiff and members of the Class." (*Id.* ¶ 35)

"As a result of the [sic] SSB's failure to disclose material information within the context of fiduciary relationships, Plaintiff and the Class Members are entitle to recoup all fees and commissions paid to SSB while maintaining accounts with SSB during the class period." (*Id.* ¶ 40.)

"That the Court Order [sic] restitution to restore to plaintiff and members of the Class all fees and commissions acquired by means of any act or practice declared by this court to be unlawful, unfair or fraudulent business practice" (*Id.*, Prayer for Relief ¶ 4.)

As the district court observed, the only possible reason that Petitioner would have paid commissions to SSB would be in connection with purchases of securities. (App. at 14a-15a.) Petitioner's assertion that this action does *not* involve the

purchase or sale of securities is thus belied by his own complaint.[1]

In presenting his questions to this Court, then, Petitioner is presenting questions that have not been decided by the courts below. That is, because the only complaint considered by the courts below in fact sought restitution of brokerage commissions, Petitioner simply errs when he asserts that this Petition involves a case that "do[es] not involve the purchase or sale of a publicly traded security." (Pet. at i.) This Court does not ordinarily, and should not in this case, exercise its discretion to review, on a writ of certiorari, questions not decided below. *See Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955) (stating that questions not raised below are not open for review before the Supreme Court, in dismissing a writ of certiorari as improvidently granted); Robert L. Stern *et al.*, *Supreme Court Practice* 459-60 (8th ed. 2002) ("In a surprisingly large number of cases every year, the petition raises questions that were not decided by the court below because they were not raised, or seriously mischaracterizes the holding of the court. Demonstration of such a defect is ordinarily fatal to the petition.")

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[1] Even if the district court and Ninth Circuit *had* considered the First Amended Complaint, the same result would obtain. Petitioner complains about SSB's research analyst reports concerning publicly traded securities, which plainly "coincide with" the purchase and sale of securities as this Court has defined that term in the context of Section 10(b) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a *et seq.*), in *SEC* v. *Zandford*, 535 U.S. 813, 819-25 (2002), and elsewhere. However, in light of Petitioner's allegations in his complaint, the courts below were not required reach this issue, and this Petition accordingly does not present this question.

B. The Ninth Circuit's Memorandum Disposition Is Consistent With the Decisions of Other Federal Appellate Courts Concerning SLUSA

Every circuit to have considered a putative class action involving claims for trading commissions brought under state law has ruled that such a claim is necessarily alleged "in connection with" the purchase or sale of securities, and thus is preempted by SLUSA. Those courts, like the Ninth Circuit, have all first concluded that the "in connection with" language of SLUSA should be interpreted following this Court's guidance concerning identical language in Section 10(b) of the Securities Exchange Act of 1934. *Falkowski* v. *Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002); *accord Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir. 2005); *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 (2d Cir. 2005); *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith*, 292 F.3d 1334, 1342 (11th Cir. 2002); *Green* v. *Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002).

Following this Court's interpretation of the Section 10(b) "in connection with" language, those courts have then uniformly concluded that a prayer for relief seeking restitution of commissions "connect[s] plaintiff's state law action to the purchase or sale of securities, and bring[s] it well within the bounds of SLUSA." *Rowinski*, 398 F.3d at 303. Indeed, in *Rowinski*, which is not cited in the Petition, the Third Circuit affirmed the district court's finding of preemption of a complaint against Respondent Salomon Smith Barney that is virtually indistinguishable from the complaint in this action. In *Rowinski*, as here, plaintiff brought state law claims concerning SSB's research reports, and the Third Circuit – like the courts below – concluded that the claims were preempted because plaintiffs' "prayer for relief encompasses trading fees and commissions—charges incurred only in connection with the purchase or sale of securities." *Id.*

Every other circuit court to reach the issue has reached the same conclusion. *Dabit* 395 F.3d at 48 ("We hold that ... the claims for commissions paid to Merrill Lynch are preempted because they necessarily involve allegations of a purchase or sale of securities 'in connection with' this alleged misconduct."); *Behlen* v. *Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002) (holding that removal and dismissal under SLUSA was proper because "the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions"). The Ninth Circuit's affirmance of the dismissal of Petitioner's commissions-based claims thus is entirely consistent with the consensus in the quickly maturing body of caselaw under SLUSA. There is simply no circuit split warranting the issuance of a writ of certiorari in this case.

Petitioner strains to assert that the Ninth Circuit's unpublished disposition below somehow conflicts with published opinions of the Second and Eleventh Circuits. Petitioner is wrong on both counts. First, the disposition below is consistent with the Second Circuit's decision in *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005). Indeed, the Second Circuit was quite explicit that where, as here, a plaintiff alleges commissions-based damages, those claims are preempted by SLUSA, because they "necessarily involve allegations of a purchase or sale of securities." *Dabit*, 395 F.3d at 48.

Petitioner also contends that the disposition below conflicts with the Eighth Circuit's decision in *Green* v. *Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). But that case involved facts not at all comparable to those present here. There the breach alleged was the defendant's failure to provide "real time, last sales information"; plaintiff alleged that the information provided by a data service was outdated. *Id.* at 594-95. The claimed breach thus related not to any purportedly fraudulent misrepresentation, but rather to whether a data service functioned, as a technical matter, as it was supposed to. Moreover, in *Green* there was no indication that plaintiffs had

purchased any securities in reliance on this data,[2] and the service fee plaintiffs sought to recover was a flat monthly fee—not, as here, transaction-based commissions and fees. *Id.* at 593, 597.

Accordingly, Petitioner's attempt to devise a circuit split fails, and review by this Court of the memorandum disposition below is not warranted.

C. The Disposition Below Does Not Raise Any Federalism Concerns

Petitioner is mistaken when he contends that the courts below erred by determining that his claims are preempted because federalism concerns purportedly militate against the preemption of certain claims brought under California common law. (Pet. at 16-19.) Petitioner's contention that the court below erred because its holding that Petitioner's claims are preempted forecloses an avenue of relief under state law misses the point of preemption entirely.[3] As a number of circuits have recognized, SLUSA is a "complete preemption" statute. *E.g.*, *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 & n.5 (2d Cir. 2003); *Falkowski*, 309 F.3d at 1127-28. Congress has thus already made the clear policy determination that state-law class actions that allege the

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[2] Setting aside the question whether SLUSA preemption applies where plaintiffs do not plead reliance on the misstatement or omission in question, where, as here, such reliance is evident from the face of the complaint, preemption plainly applies.

[3] Petitioner obliquely contends for the first time in this Court that he seeks "holding" damages and that actions seeking such damages are not preempted under SLUSA. Petitioner may well cite the Seventh Circuit's decision last week in *Kircher* v. *Putnam Funds Trust*, No. 04-1495, 2005 WL 757255 (7th Cir. Apr. 5, 2005), in support of his contention that the circuits are split on this question. However, the question whether SLUSA preempts "holder" claims was neither raised nor decided below, was not fairly presented by the complaint, and is thus not raised by this Petition.

"misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" are *completely* preempted, no matter what statute or common law doctrine a plaintiff may seek to avail himself of. *Falkowski*, 309 F.3d at 1127-28. The Senate Report on SLUSA addresses this point directly and is therefore worth quoting at length:

> Some critics of establishing a uniform standard of liability have attacked [SLUSA] as being an affront on Federalism and contrary to the recent trend towards reinforcing state rights. Proponents of the legislation have argued that we live in an information age in which we have truly national, if not international, securities markets and that uniform standard are entirely consistent with Congress's preeminent power over the regulation of interstate and foreign commerce. The Committee, while sensitive to both these considerations, found the interest in promoting efficient national markets to be the more convincing and compelling consideration in this context.

S. Rep. No. 105-182 (1998), *available at* 1998 WL 226714, at *4.

And this Court has held time and again that when Congress completely preempts an area of law, it essentially federalizes any state-law causes of action. For instance, just two Terms ago, the Court held that "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003).

Petitioner's complaint that he is foreclosed from pursuing claims authorized by the California Supreme Court therefore should be addressed to Congress, which has made a policy decision disfavoring certain state-law remedies, and not

to this Court. And to the extent that Petitioner is not complaining about the policy decision that Congress made, but rather about the lower courts' conclusion that his state common law claims are preempted, that is not a question of federalism but rather a garden variety example of statutory interpretation that, as we show above, does not merit certiorari review. Regardless, Petitioner's federalism concerns are readily dismissed.

D. The Court Should Not Grant Review on a Writ of Certiorari Because the Ninth Circuit's Opinion Was Unpublished and Nonprecedential

The Ninth Circuit designated its opinion in this case as "not appropriate for publication" under Ninth Circuit Rule 36-3. (App. at 1a.) This Rule states that unpublished opinions are "not binding precedent," except in limited circumstances not relevant here. 9th Cir. R. 36-3(a). The unpublished, nonprecedential nature of the Ninth Circuit's opinion in this case thus makes it a poor candidate for review on a writ of certiorari.

Commentators have noted that, while this Court "occasionally" grants certiorari to review unpublished opinions, "it does not ordinarily do so and the fact that an opinion is unpublished is relevant to the Court's consideration of the need for review." Stern *et al.* at 459. This Court should follow its regular practice in declining to grant certiorari review of the Ninth Circuit's opinion in this case for two related reasons. First, in issuing only an unpublished, nonprecedential opinion, the Ninth Circuit has not taken a definitive position on the legal doctrine at issue in this case. A later panel of the Circuit would be entirely within its rights to decide the same issues in a different fashion. Therefore, the Ninth Circuit has not developed the law at issue here sufficiently to make prudent the exercise of this Court's discretionary jurisdiction. Second, the unpublished, nonprecedential nature of the opinion makes Petitioner's asserted split between the Ninth Circuit, on the one

hand, and the Second and Eighth Circuits, on the other, illusory. As the Ninth Circuit has not yet issued a precedential opinion on the specific SLUSA preemption issues in this case, there is no Ninth Circuit law on those issues that is binding on future panels, and there by definition cannot be a circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 11, 2005

Respectfully submitted,

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